

billing. Second, each time a customer record is edited (e.g., when a customer adds or decreases units, modifies service options, etc.) the old information is overwritten and thus lost. In this regard, Mr. Kay's custom system is typical of the off-the-shelf software packages designed for small SMR operators.

Id. at ¶ 8.

69. In Kay's normal business practice, he did not maintain and organize his records by call sign. Tr. 987. James Hanno observed:

Mr. Kay stores customer information in his billing system by frequency and repeater location rather than by call sign. In my experience, this is not uncommon in the SMR industry, particularly when there are multiple sites covered by a given call sign, multiple call signs at a particular repeater site, and sometimes even multiple calls signs for a single repeater. It is much simpler and more meaningful to the operator to keep the information by site location and frequency.

Id. at ¶ 9. After Kay's staff, with Craig Sobel's assistance, had generated the November 1995, "loading report," Kay went through it and cross-referenced the repeater locations and frequencies against his paper records and manually wrote the corresponding call signs on each sheet. Tr. 986. This process required Kay to manually parse through the records for more than 150 call signs in order to comply with the Bureau's request. Tr. 987, 1160-1161.

70. In producing the November 1995 leading report, Kay expressly qualified it as follows:

These reports are generated as of November 9, 1995, and represent each customer's current repeater system configuration. ... No customer who discontinued service prior to September 1993 is included, and prior usage by customers of other frequencies, addition of sites, deletion of sites, additions of frequencies, deletion of frequencies, increases in mobiles, decreases in mobiles, and changes in frequency from prior system configurations are not reflected in the attached Loading Reports.

Note: records were not kept "by call sign." Information is kept by repeater customer name in current configuration only. Also, Kay's records do not reflect Kay's own shop use, nor records of other users in other shops who used radios at no charge, and these records do not include rentals, demos and loaners, because none of these records resulted in customer billing for repeater services, even though use of the repeaters did occur.

WTB Ex. 19 at pp. 1-2.

71. The data in Kay's computerized billing system is stored in files known as "DBF" files, i.e., in a standard database format. Tr. 1088-1089, 1420-1422. Concerns for confidentiality of customer data aside, the idea of producing the underlying DBF files from the billing system

in response to the Bureau's January 31, 1994, 308(b) Request was simply something that never occurred to Kay at the time, or even later during discovery. Kay was not intimately familiar with the internal workings of the billing system. Tr. 1088-1089. Kay had never before and has never since, produced any information to the government on magnetic media. Tr. 1044, 1095. The computer system was designed to generate customer bills, not to store and retrieve system loading data. Thus, even if Kay had been able to provide uncorrupted DBF files in January 1994, they would have been neither complete nor responsive to the 308(b) Request. The mobile loading data was maintained in the system solely for internal convenience, not as a legal record, and the data was not audited for accuracy or completeness. Tr. 1045.

72. As previously explained, the data files were generated and maintained by a billing software package custom designed for Kay. Tr. 1394-1385. Even if the Bureau had been provided with the DBF files, it would not have had the custom billing package needed to view and manipulate the files. Based on the testimony of Eric R. Johnson, a computer expert who testified at the hearing, there is reason to question the integrity and reliability of data produced by simply copying the DBF files. Although it is possible to view a DBF file generated by a custom database application in other software packages, it is not possible to insure that the integrity of the data will be maintained. This is because customer database applications are typically designed to have links whereby different data fields are interrelated and internal calculations are made. It cannot be assured that these internal links and calculations will be accurately reflected and reproduced if the DBF file is viewed with a software package other than its native application. Tr. 2046-2048.

73. The paper records produced by Kay in March 1995 (the customer maintenance screen printouts), WTB Ex. 347, and in November 1995 (the loading reports), WTB Ex. 19, contain virtually all of the same data that would have been contained in the DBF files. These productions actually were more accurate and reliable than the DBF files. Prior to producing the customer maintenance screen printouts in March 1995, Kay and his staff went through the more than 850 records, customer-by-customer, and did their best to audit the data to make sure it was accurate by matching it against the paper files and records. Tr. 1045-1046.

74. Kay generally performed the backups of the computer system. Backups of the Xenix system did not work properly, and the data was lost when the system ultimately crashed following the Northridge earthquake. Kay had backed up the Xenix system approximately every couple weeks, using a single backup tape that was overwritten each time. Kay understands that some sort of "file-allocation" table error on the Xenix server was duplicated on the backup, resulting in data loss. Tr. 1092. The last backup of the Xenix system would have occurred in January 1994. Tr. 1094. Kay later started doing backups of the DOS system in approximately July 1994. Tr. 1080-1090. On the DOS system, he performs backups approximately once a week and uses about three backup tapes which he rotates, overwriting the oldest one first. Tr. 1089-1091. Craig Sobel developed the backup routine, and Kay understood that it first erased the old files from the backup tape and then copied the current files from the server to the tape, so that the practical effect was "overwriting" the tape. Tr. 1090-1091.

75. Kay also had a practice under the old Xenix system of periodically purging deleted accounts from the billing system. Tr. 1094. Craig Sobel explained that when files are "deleted" from the system, they actually are simply marked for deletion (i.e., a delete flag is set), but are not actually purged until the database is "packed". Tr. 1428-1429. The Xenix system was last purged in approximately September 1993, and there have been no purges of the DOS system. Tr. 1094.

76. Just as it had never occurred to Kay to produce copies of the DBF files in response to Bureau requests for information. Tr. 1044, he likewise never considered producing the backup tapes in response to the 308(b) Request. Tr. 1095. When the idea was suggested to him during the hearing, however, he noted that, in addition to the fact that he had never previously provided any government agency with information in magnetic form, the backup tape cartridges would also have included a wide range of materials on his computer system (including confidential correspondence with legal counsel), and, like the DBF files themselves, would not reasonably have been responsive to the information request. Tr. 1095.

Construction and Operation Issue

77. This issue may be divided into two parts: (1) whether Kay willfully or repeatedly violated rules regarding timely construction and/or permanent discontinuance of authorized facilities, and (2) whether Kay willfully or repeatedly violated rules regarding system loading.

Timely Construction and/or Permanent Discontinuance

78. Kay generally constructed facilities promptly after license grant, if not before. Tr. 959. Indeed, he had a financial incentive to do so, in that the sooner he constructed and got a station operational, the sooner he could place customers on it and start generating revenue. Tr. 2366-2367. Often repeaters were pre-constructed, in which case the construction date is the date of license grant. Tr. 959. In cases where Kay converted users' existing licenses to private carrier or SMR systems licensed to Kay, the facilities were already constructed upon grant of the conversion authorization. Tr. 900-901. Similarly, facilities associated with authorizations which Kay acquired by assignment were deemed "constructed" as of the date the assignment of license application was granted. Tr. 901. Even where application was made for a new facility, Kay often pre-constructed stations, installing all the hardware, tuning the transmitter, and arranging for it to be remotely activated upon receipt of authorization. Tr. 2366. Even when not pre-constructed, new installations were typically completed within two to three months after grant. Id.

79. When Kay completed construction of a new location, he jotted down the date on a slip of paper which he would stick in a file. When the 800A letter ¹¹ arrived from the

¹¹ 800A letters are form letters that the FCC routinely mails to licenses of 800 MHz systems inquiring as to the date and particulars of station construction. Tr. 983-984.

Commission he would then transfer the date and other pertinent information onto the 800A letter, mail it back to the Commission, keep a copy in the file, and discard the note. Tr. 958, 2367-2368.

80. Kay did not otherwise keep records specifically recording the construction completion dates of his facilities. This was due primarily to the way his systems were configured and how his business was operated. The measurements and alignment of Kay's repeaters was typically done weeks or months in advance of actual installation. Tr. 953. When equipment arrived from a vendor, it was untested, not tuned, and not assigned to a working frequency. Tr. 954. The equipment was removed from the box, aligned, tuned, power levels were set, and then set up on a test frequency. At that point it was placed on a shelf along with the other inventory and was not yet part of a particular station or call sign. Tr. 955. When a repeater was needed, one of these conditioned radios was pulled from the inventory. When a technician went to service a repeater site, he would frequently take one of the inventory repeaters with him and, if the problem was not something that could be easily repaired at the site, the malfunctioning repeater was removed, the inventory repeater was tuned to the frequency and installed, and the malfunctioning radio was returned to the shop where it could be repaired, if possible, and cycled back into the inventory. Tr. 956. As a result of this procedure, equipment was constantly being recycled, and Kay did not maintain records that associated and tracked a particular piece of equipment to a particular call sign. Tr. 956.

81. This practice regarding inventory and record keeping was reviewed by James P. Hanno, an expert witness with over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Mr. Hanno stated:

The procedure described above is typical of most SMR operations with which I am familiar, especially those using modular, rack-mounted units. As practiced by Mr. Kay, the only records maintained in these instances are any purchase invoices, shipping statements, etc., associated with the purchase, delivery, and acceptance of the repeater, and possibly any work orders for specific installations or repairs. It is my understanding that Mr. Kay does not maintain detailed serial number records tracking all the changes and repairs made with respect to a specific licensed location, nor does he maintain logs at the repeater locations themselves. In my experience, fewer than half of all SMR operators maintain any more detailed records in this regard than does Mr. Kay.

Id. at ¶ 11.

82. During the course of discovery, Kay provided the Bureau with as accurate and as complete information as possible regarding the dates on which his various facilities were constructed. In those cases where the facilities were neither pre-constructed, already constructed at grant, or there was no 800A letter, Kay did his best to determine the historical construction date by reference to other records, e.g., service invoices. Tr. 902. On or about May 11, 1995, Kay submitted his Amended Responses to Wireless Telecommunications Bureau's First Set of Interrogatories. Attachment A to that filing is a tabulation showing, inter alia, the license grant

date and construction date for each Part 90 facility licensed to Kay. WTB Ex. 290. For purposes of this proceeding, the parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments" column of Attachment A, that site was either not timely constructed or that operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered by this stipulation were not timely constructed or that service on each facilities has been permanently discontinued.

83. The Wireless Telecommunications Bureau's Statement of Readiness for Hearing was filed in this proceeding on or about June 3, 1998. Paragraph 14 of that pleading provided: "The Bureau intends to present evidence that Kay did not construct stations WPEE253, WIK726, WIK896, WIK664, WIL260, WIK983, WIH339, WIL469, WIK875, WIK287, WIK374, WNJL306, and WNXW487 by the pertinent deadlines." Kay's uncontested testimony as to each of these stations is as follows:

- WPEE253. Kay testified that this station was already constructed at the time the authorization was granted to him. Before it was licensed to him, Kay had been operating it as a community repeater on behalf of a customer, and it was later converted. Tr. 2363.
- WIK276, WIK896, WIK664, WIL260, WIK983, WIL469, WIK875, WIK287, and WIK374. Kay testified that each of these stations was timely constructed. He specifically recalled having a lease at Sierra Peak, first at the Meridian Building and later at the TLF Building, and timely installing all repeaters that were going into Sierra Peak. Tr. 2362-2365.
- WIH339. Kay recalled that this station was initially constructed at Mount Lukens at the time he acquired the authorization by assignment from a customer. Subsequently a location was added at Sierra Peak, and that modification was also timely constructed. Tr. 2365.
- WNJL306. Kay specifically recalls the timely construction of this station at Santiago Peak in January or February 1988 at the Meridian Building, in that he recalls "getting a flat tire 20 miles back in the middle of nowhere." Tr. 2365-2366.
- WNXW487. Kay testified that this station was timely constructed at both authorized locations, Heaps Peak and Santiago Peak, on a timely basis.

System Loading

84. Kay operated stations on a commercial basis providing repeater service to end users. He established repeaters and provided communications service to end users through those repeaters. This is akin to the provision of cellular service. Tr. 864. He offered these services

through Specialized Mobile Radio (SMR) stations that operated in the 800 MHz band, and through private carrier stations that operated in the 470-512 MHz band or "UHF". Tr. 1002, 1108. Kay's UHF stations were licensed in the Business Radio Service. Tr. 960-961. In both the 800 MHz and the UHF bands, Kay also operated community repeaters for customers. Tr. 971. In these circumstances the repeater authorization was held by the customer who either owned the repeater equipment or rented it from Kay. Tr. 938.

85. Prior to 1994, one of the items specified on an application for a private carrier UHF repeater license would have been the number of mobile units to be authorized. Tr. 974. During the period from October 1992 to some time in 1994, one of the items specified in an application for a conventional SMR 800 MHz repeater license was the number of mobile units to be authorized. Tr. 971, 975. Prior to October 1992, mobile units were not authorized as part of an SMR repeater license, and end users were separately licensed for the number of mobiles required by them. Tr. 975-976. Thus, prior to October 1992, two authorizations were effectively required to legitimize 800 MHz SMR repeater operations--the repeater authorization held by the SMR operator, and the end user license held by the user. Tr. 1890-1899. Sometimes, end user applications were submitted concurrently with the repeater application as part of a package filing; at other times, the repeater application and end user applications were submitted separately at different times. It all depended on the particular configuration and circumstances. Tr. 976.

86. The October 1992 date is significant because 800 MHz end user licensing was eliminated as of that date. In August 1992 the Commission amended its rules and regulations to eliminate separate end user licensing as to 800 MHz SMR stations. Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order, PR Docket No. 92-79, 7 FCC Rcd 5558, 71 Rad Reg. 2d (P&F) 166 (1992). The elimination of end-user licensing became effective on October 8, 1992. 57 Fed Reg. 40850 (September 8, 1992). After October 1992 the Commission no longer accepted applications for 800 MHz SMR end user licenses. Tr. 972, 1906.

87. When Kay filed applications specifying a number of mobile units, he was generally projecting anticipated loading for as much as twelve months out, i.e., allowing approximately four months for the coordination and procession of the application plus the eight month construction and "in-operation" deadline applicable at the time. Tr. 976-977. In making these projections, Kay relied on his business judgment, his knowledge of the radio industry, his familiarity with his own business, anticipated sales, anticipated need for additional frequencies to meet customer expansion needs, communications with other radio dealers, conversations with his customers, etc. Tr. 977. He was making a "crystal ball" prediction, a forecast, a business estimate of anticipated future needs. Tr. 977-978.

88. Kay's computer-based billing system (from which the data in WTB Exs. 19 and 347 was derived) provides neither a complete nor an accurate accounting of the loading on Kay's system. Kay considers the "loading" on a system to include his own "hard paying" customers (i.e., direct customers who pay Lucky's for repeater service); customers of other radio shops who obtain repeater service through Kay's facilities pursuant to special arrangements between those

shops and Lucky's rental units which Southland charged for rental but which Lucky's did not charge for the repeater service; shop radios and "demo" units on hand for internal and other miscellaneous uses. Tr. 1069, 1087, 1116, 1128-1129. In short, the database reflects mobile units only for accounts for which a bill was generated to send to a customer. Tr. 1153-1154, and even then the billing system database would not accurately reflect many of these units, either currently or historically, for a number of reasons.

89. The database contained no information on any non-current customer who canceled service prior to approximately September 1993--the date the Xenix system was last purged. Tr. 1046, 1087-1088. For customers who are reflected in the database, only their most recent configuration is given. Changes in customer configuration (changes in repeater sites, additions or deletions of units, etc.) are not tracked. Tr. 1433. The database was designed solely and exclusively to facilitate billing, not to track loading; it does not accurately reflect loading. Kay often included access to multiple repeater sites as part of a customer's service package, but only billed the customer for one site. For example, a customer might be billed for access to repeaters at Mount Lukens and also given "free" access to repeaters at Sierra Peak, and only Mount Lukens would be reflected in the database. Tr. 1017-1018, 1048-1049. Prior to some time in either late 1993 or early 1994, the customer maintenance screen format did not accommodate a large number of repeater sites without the software causing other problems, and so the so-called "free" sites were not reflected. Tr. 1049, 1106-1107. But whether or not Kay specifically charged for access to a repeater site, if the customers had access to and, in fact, used the site, it was doing so pursuant to Kay's license and was, therefore, properly considered part of the loading on the system. Tr. 1075.

90. The table below shows, in each columns from left to right: (a) the call sign and primary location of each trunked SMR (YX) authorization currently held by Kay; (b) the number of base station repeater channels authorized under the call sign at the primary location;¹² (c) the number of mobiles required to satisfy the 70 mobiles per channel loading criterion;¹³ and, (d) the actual number of units reflected in Kay's billing records as of November 1995. As shown, Kay's trunked SMR (YX) systems were fully loaded to well over 70 mobiles per channel.

Loading on Kay's Trunked SMR (YX) Systems

<u>Call Sign / Location</u>	<u>Channels</u>	<u>Required</u>	<u>Actual</u>
WNMY402 / Mount Luken	11	1260	2687 ¹⁴

¹² The Bureau has not presented any evidence against Kay under the loading issue as to his trunked system. Likewise, it has not urged an adverse determination under this issue.

¹³ The figures in this column were calculated by multiplying the number of authorized base station repeater channels by 70.

¹⁴ WTB Ex. 19 at pp. 148-157.

WNPJ874 / Mount Lukens	7	(combined)	(combined)
WNJA910 / Oat Mountain	17	1190	2028 ¹⁵
WNSK552 / Castro Peak	3	210	785 ¹⁶
WNJL306 / Santiago Peak	9	630	2702 ¹⁷
WNXW327 / Heaps Peak	8	560	743 ¹⁸
WNKV762 / Snow Peak	3	210	453 ¹⁹

91. Kay provided repeater service to end users on a commercial basis acting as a "private carrier" with respect to UHF stations or as an "SMR" with respect to 800 MHz stations. Unlike other Part 90 licenses, commercial service providers experience a constant fluctuation in loading. Customers come and go, customers increase and decrease their mobile counts and otherwise change their configuration, with the result that loading goes up and down over any particular period of time. Tr. 1002, 1116-1117, 1130-1131. Kay kept radios in inventory to be able to respond to these constant changes and fluctuations in customers demand, as well as to be used as loaners, rentals, and demos. The record reflects that Kay maintained an inventory of user radios (both UHF and 800 MHz, both conventional and trunking) from approximately 1,000 to 1,500 units before the January 1994 earthquake and about 600 to 700 units after the earthquake and now. Tr. 2273-2274, 2494-2495; Kay Ex. 48.

92. In addition to repeater service provided directly to users by Lucky's and/or radios sold or rented to users by Southland, Kay has arrangements with more than two dozen other dealers who use Lucky's repeaters for their own internal shop and memo use, to provide service to loaner and rental units and to provide service to their own customers. Tr. 2374-2377. These dealers, at any given time, have an average of 15 to 20 loaners, demos, and rentals active on Kay's repeater system but which would not be reflected in Kay's computer-based billing system. Tr. 2378-2379. Kay identified a substantial number of these dealers by name, specifically confirming his relationship with them currently and prior to January 1994. Tr. 2379-2382. The billing system and hence the data reproduced in WTB Ex. No. 19, reflects no loading on certain stations simply because the service area is overlapped by other stations, the specified facility is one

¹⁵ WTB Ex. 19 at pp. 157-165.

¹⁶ WTB Ex. 19 at pp. 166-169.

¹⁷ WTB Ex. 19 at pp. 179-177.

¹⁸ WTB Ex. 19 at pp. 178-181.

¹⁹ WTB Ex. 19 at pp. 186-187.

licensed under multiple call signs and other similar idiosyncrasies. Tr. 1107-1113. It also did not reflect "talk-around" use, *i.e.*, units that transmit direct, mobile-to-mobile, without going through the repeater itself, but which nonetheless operate under the auspices of the repeater authorization. Tr. 1078, 1082.

93. Most applications submitted by Kay did not require an examination of loading. Kay recalls only a few times when he was actually required to demonstrate loading on his own system. Tr. 1221. Kay explained that he had found legitimate ways to avoid the exercise because it was such a complicated task. It required looking at the entire loading situation on the channel by all licensees. If a channel were already loaded to more than the specified level by other co-channel licensees, the loading on the application that he was proposing did not matter. When Kay did have to look at the loading on his own system, he relied on the totality of his business records (computer system, paper records, *etc.* plus what he knew off the top of his head. Tr. 1221-1226. Another method used by Kay was to "package" repeater applications with the end user applications in such a manner that the question of loading on existing systems of the applicant would be irrelevant because an application "would be granted into a fully loaded environment," Tr. 976, 2342-23243. Indeed, the record contains an example of such a "package" application that was presented by Kay and granted by the Commission. WTB Ex. 311; Tr. 2347-2349.

Multiple Applications Issue

(1) Roy Jensen

94. Roy Jensen was employed by Southland from the Spring of 1990 to May 1992. Tr. 1463. He became general manager shortly after joining Southland. Tr. 1464. Neither Jensen nor the Southland employees he supervised had any direct duties with regard to Lucky's. Tr. 1465. Jensen and Kay had late dinners together several times a week during which they would, in Jensen's words, "discuss business in general." Tr. 1493.

95. Jensen's "best recollection" is that Kay asked Jensen to sign an application for a land mobile license. Tr. 1484. He believes that WTB Ex. 306 is a copy of that application. Tr. 1486. It is an application for an 800 MHz end user license, FCC File No. 9008511576, seeking authority to operate 37 mobiles. WTB Ex. 306 at p. 1. The applicant is designated as Roy Jensen dba Consolidated Financial Holdings. *Id.* The application was granted by the Commission, and an end user license (Call Sign. WNUG662) was issued, which Jensen received in the mail. WTB Ex. 307; Tr. 1488.

96. Jensen testified that Consolidated Financial Holdings is a business name that he registered some time ago in order to pursue business activities unrelated to his employment at Southland. He does not recall when he took out the name, but it could have been during his first year at Southland, *i.e.*, 1990. He does not recall the nature of the anticipated business project and he states that he never pursued it. Tr. 1478-1479. Jensen denies that Consolidated Financial Holdings ever operated any radios (repeaters or mobiles), Tr. 1485, and he denies that he ever

told Kay he wanted to operate 37 mobiles, Tr. 1488. Jensen does acknowledge having done off-hours surveillance work, together with Southland employee Kevin Hessman, providing mobile radio communications support for the Los Angeles Police Department. Tr. 1521-1523.

97. Kay testified that he assisted Jensen in obtaining the user license so that Jensen could use shop radios outside of his employment with Southland to pursue his own business interests. Kay recalled that Jensen "was always involved in one type of would-be entrepreneurship or another.... He always wanted to have his hand in business in some fashion." Tr. 2520. When Jensen expressed admiration and interest in Kay's SMR activities. Kay explained that Jensen could do that as well, and he assisted Jensen in obtaining the end user license and provided Jensen with free use of shop radios to pursue Jensen's outside business activities. Tr. 2520-2521. There was no written agreement between Jensen and Kay. Tr. 1485, 2521.

98. When asked about the termination of his employment with Southland, Jensen testified that he had been "laid off" in May 1992. Tr. 1507. This was a repeat of a false statement that Jensen had previously made to another government agency. See Kay Ex. No. 1. In a ruling, dated October 7, 1992, Administrative Law Judge Polly Thomas of the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board, in Case No. ING-63549, concluded that Jensen's "testimony, that he believed after leaving his final meeting with [Kay] that he had been laid off, was not found to be credible." Kay Ex. No. 1 at p. 4. She further found that "when [Jensen] wrote on his application for [unemployment] benefits... that he had been laid off, he knowingly made up false statement to the Department." *Id.* (emphasis added). "Apparently believing that the real reasons for his being out of work would disqualify him for unemployment benefits, [Jensen] attempted to hide the complete circumstances of his discharge from the Department." *Id.* at pp. 4-5 (emphasis added).

(2) Kevin Hessman

99. Kevin Hessman was employed by Southland from May 1990 to October 1993. Tr. 1796-1797. He obtained the job through his friendship with Roy Jensen. Tr. 1796. He did not have any duties relating to Lucky's. Tr. 1797. He was a stock room clerk; he did shipping and receiving and was an "all around go-fer." Tr. 1797, 1292-1293.

100. Kevin Hessman claims that approximately six months after he began working for Southland, he was approached by Kay and Jensen and asked to sign some FCC application forms. Jensen allegedly told him it was to "to help Jim with the business, and everyone else did it." Tr. 1798. He does not recall Kay saying anything in this meeting; he said Jensen did most of the talking. Tr. 1798-1799.

101. WTB Ex. 208 is an 800 MHz end user license (Call Sign WNXV559) issued on July 1, 1992, in the name of Kevin Hessman dba Hessman Security, and authorizing the operation of 73 mobile units on SMRS Station WNYR747. Hessman recalls receiving this license in the mail at his mother's house where he was residing at the time. Tr. 1798. WTB Ex. 309 is an 800 MHz end user license (Call Sign WNNE920) issued on April 29, 1992, in the

name of Kevin Hessman dba Hessman Security, and authorizing the operation of 24 mobile units on SMRS Station WNXS450. Hessman also received this license in the mail. Tr. 1800-1801.

102. Hessman claims that "Hessman Security" did not exist and never operated any mobiles, yet he admits that he was "not surprised" when the licenses arrived in the mail in the name of Hessman Security. Indeed, upon reflection he recalled some sort of discussion about that and just spitballing names of what to call it. I think Hessman Security was what Roy and Jim and me just agreed on.... It was no big surprise when I got the licenses in that name." Tr. 1797, 1808, 1813-1814. When the licenses arrived, he took no steps to have the Commission correct the fact that they were issued in an allegedly nonexistent business name, Tr. 1809-1809, 1814. When the licenses arrived in the mail, Hessman says he asked Kay if Kay wanted them, and Kay said that he did not need them. Tr. 1802.

103. Hessman admits that he occasionally did off-hours "public safety" work using Southland rental radios. Tr. 1803. He also did off-hours volunteer work providing support communications to the Los Angeles Police Department. He recalls that this would involve approximately 40 people, two to a car, assisting with such things as drunk driving patrols. Tr. 1804-1805.

104. Kay recalls that at some point in approximately 1992, Hessman and/or Jensen approached Kay to ask if they could make use of company radios in connection with some sort of off-hours security operations. Kay agreed. They required a couple of channels to adequately cover the Los Angeles area, so Kay selected a couple of 800 MHz channels, prepared the appropriate applications for end user licenses, and had them signed by Kevin Hessman. Tr. 1295-1296. Kay's best recollection at the time is that he believed based on what he was told that the proposed activities involved some sort of after-hours contract security work, and he thinks that he therefore wrote it up as a business use when he prepared the end user applications. The Bureau was unable to produce copies of the actual applications, however, to refresh Kay's recollection. Tr. 1296-1297. Kay did not know the details of what Hessman and Jensen were doing in this regard at the time, because he was not "in the loop." Tr. 1296. He learned only in the course of this proceeding that they apparently were doing volunteer work for the Los Angeles Police Department. Tr. 1295, 1297. Southland employees recall that Hessman and Jensen were involved together in some sort of after-hours security activity while in Kay's employ. Tr. 2293, 2297-2299, 2315-2316, and Kay also knew that Roy Jensen had been involved with security companies before coming to work for Southland. Tr. 2520.

105. Kay's understanding of the FCC regulations was that, prior to the elimination of end user licensing in October 1992, employees who wanted to use Kay's repeater system in connection with activities outside the scope of their employment with Kay would have to be separately licensed for such use. In addition to FCC licensing considerations, if an employee were going to use Kay's radio system in pursuit of an outside business activity, e.g., contract security work, Kay believed they should be separately licensed as a separate business activity in consideration of potential liability problems. Tr. 1298.

106. Kay Ex. No. 7 is the ruling, dated January 21, 1994, by Administrative Law Judge J. S. Berger of the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board, in Case No. ING-30425. When Hessman applied for unemployment benefits after being discharged from Southland employment he alleged that he had been laid off due to lack of work, that Southland was down-sizing, and that his services were no longer needed. Kay Ex. No. 7 at p. 2. In point of fact, however, he had been discharged for cause,²⁰ in other words, fired. *Id.*; Tr. 12193-1294. Judge Berger thus found that Hessman "willfully and knowingly made false statements to obtain benefits." Kay Ex. 7 at p. 3.

(3) Vincent Cordaro

107. Vincent Cordaro worked for Southland from 1991 to May 1995. Tr. 1818, 1867. He briefly held the position of service manager, and then became general manager when Roy Jensen was terminated. Tr. 1818. He had no duties with respect to Lucky's. Tr. 1820. Prior to coming to work for Southland, Cordaro had been the owner of Mobile Service Station (MRSS), a two-way mobile radio business that was purchased by Kay. Tr. 1818. Cordaro held an SMR end user license in connection with his business activities at MRSS. Tr. 1885. His duties with MRSS also included assisting customers in obtaining necessary FCC licenses. Tr. 1889. Kay had prepared FCC applications for Cordaro when Cordaro owned MRSS. Tr. 1275. MRSS provided radio equipment and service to its customers. It did not directly provide repeater service, but Cordaro made arrangements for MRSS customers to receive repeater service through other licensees, including Lucky's. Tr. 1818.

108. Rasnow Peak SMR (Management Agreement). WTB Ex. 322 is a Radio System Management and Marketing Agreement dated November 11, 1994, between Cordaro and Kay. WTB Ex. 323 is a copy of the same agreement as re-executed by the parties on December 30, 1994, to give effect to an option provision contained in the agreement. Tr. 1273-1274. The written agreement provides that Kay will manage Station WNXR890, and at the SMR repeater that was located at Rasnow Peak,²¹ less than two miles from Cordaro's residence at the time. Tr. 1926. The station was managed in largely the same manner as stations Kay managed for Marc Sobel and Jerry Gales, except that Kay recalls that Cordaro made more direct personal use of his station. Tr. 1280. At the time the Rasnow Peak repeater was originally applied for, the channel in question was already loaded to 61 units by other licensees. This means that had Kay

²⁰ One of the reasons Kay decided to terminate Hessman's employment was that he discovered Hessman had assisted Roy Jensen (who was no longer employed by Kay at the time) in a plot to embarrass Kay in connection with civil litigation and possibly cause him to incur unjustified sanctions. In attempting to clarify an unrecognized deposit in a Southland bank account, Kay discovered evidence indicating that Jensen had written a check made payable to Southland, given it to Hessman who took it to work and stamped it with a Southland endorsement stamp, and then returned it to Jensen, who deposited it in a Southland account in order to make it appear that Kay was falsely accusing him of not having paid a certain sum of money. Tr. 1293-1294.

²¹ The Bureau did not introduce a copy of the authorization for this station, but the record reflects that it is an SMR repeater facility on 852.4875 MHz at a location known as Rasnow Peak. *E.g.*, WTB Exs. 319 & 321.

desired to apply for the license in his own name he could have easily done so—if his base station license had been accompanied by a proposal to serve a minimum of nine end user units, the application would have been acceptable without regard to loading (or lack thereof) on any other stations licensed to Kay. Tr. 2479-2483.

109. Prior to execution of the written agreement, there was an oral understanding between Kay and Cordaro regarding Cordaro's Rasnow Peak SMR. Tr. 1274. The understanding was that Kay would supply the equipment and would market the station to the extent he could. Cordaro would have free use of mobiles on the station. Kay was to receive the first \$500 or \$600 (he does not remember the precise amount) of any revenues generated from his marketing of services on the station. Tr. 1276-1277.

110. Cordaro and Kay entered into an oral arrangement whereby Cordaro would obtain a license for an SMR facility located at Rasnow Peak, which was less than two miles from Cordaro's residence at the time. Tr. 1926.

111. Rasnow Peak SMR (Assignment Application). WTB Ex. 321 is an application for Commission consent to the assignment of the license for SMRS Station WNXR890 from Cordaro to Kay. The assignor's portion of the application (an FCC Form 1046) bears the signature of Vince Cordaro and is dated 11/21/92. WTB Ex. 321 at p. 3. It is accompanied by a notary form executed by Barbara Ashauer indicating that Vince Cordaro appeared personally before her on November 21, 1992, and executed a one page document entitled Assignment of Authorization (the same title appearing on the FCC Form 1046). Id. at p. 4. The assignor's portion of the application (FCC Form 574) bears the signature of James A. Kay, Jr. dated 4/24/94. Id. at p. 1. Kay explained that, although the Form 1046 had been executed by Cordaro in November 1992, Kay did not file the assignment application until sometime after April 24, 1994, because if "basically got lost in the shuffle." Tr. 1290. Kay does not specifically recall advising Cordaro in April 1994 that he was filing the assignment application, but he is sure he would have done so. Tr. 1290-1291.

112. Cordaro understands that by executing an FCC Form 1046 he is assigning his rights in a Part 90 radio license to another entity. Tr. 1850. He acknowledges that his signature is on the FCC Form 1046 with respect to SMRS Station WNXR890 (WTB Ex. 321 at p. 3), but he claims the form was not completed (i.e., was blank) when he executed it. Tr. 1850-1851. Cordaro claims that on one or more occasions Kay presented him with blank FCC application forms and asked Cordaro to sign them. Tr. 1851-1853. He claims to have been unaware of the assignment application until after he left Southland and it was called to his attention by Barney Peterson, another Los Angeles area SMR operator. Tr. 1854-1855. On or about April 18, 1995, the Wireless Bureau in Gettysburg, Pennsylvania received a letter, dated April 14, 1995, addressed to Terry Fishel from Cordaro which stated as follows:

This letter is to serve as formal notification that I do not consent to the assignment of station license WNXR890 to James A. Kay, Jr. or anyone else. Although the referenced filing may include an assignment of authorization signed by me, it was filed under false pretenses.

WTB Ex. 325. Cordaro's signature is on the letter, Tr. 1855, but Cordaro does not recall writing or sending the letter. Tr. 1856.

113. Barbara Ashauer, who notarized Cordaro's signature on the FCC Form 1046 testified that she would not have notarized Cordaro's signature on a blank FCC Form 1046 because the applicable California notary rules prohibit notarizing a signature on any form that is not complete. If there are blanks that are not to be filled in for some legitimate reason, that is to be indicated by putting a line through it, filling in "N/A" to indicate "not applicable," or some similar indication. Tr. 1988-1999. She has never executed a notarization such as this one when information on the accompanying form was left blank. Tr. 1999.

114. Cordaro did not renew the authorization for the Rasnow Peak SMR facility, and the license for Station WNXR890 expired and was purged from the Commission's database. Thus, neither the license nor the management agreement is any longer effective. Tr. 1279, 1947.

115. End User Licenses. WTB Ex. 316 is an 800 MHz end user license (Call Sign WPBB695) issued on November 16, 1993, in the name of Vince Cordaro dba VSC Enterprises, and authorizing the operation of 64 mobiles units on SMRS Station WNXR890. Kay believes he more than likely assisted in the preparation of the application for this license on behalf of Cordaro, but he could not state for certain without reviewing the application itself which was not made available by the Bureau. Tr. 1282. Kay recognized it as an end user authorization that allowed Cordaro to operate up to 64 units and/or share use with other users on an SMR base station also licensed to Cordaro. Tr. 1282-1283. Kay recalls that the channel was already fully loaded in this area at the time. Kay does not recall how the number of 64 mobile units was arrived at, but the number was largely irrelevant insofar as Kay recalls this channel was already fully loaded by other co-channel users at the time, and no applications for new facilities could be filed regardless of whether Cordaro was licensed for 1 unit or 500 units. Tr. 1283-1284.

116. Santiago Peak SMR. WTB Ex. 317 is an SMR repeater license (Call Sign WNPY680), issued September 30, 1992, in the name of Vincent S. Cordaro dba VSC Enterprises, authorizing a facilities on 851.4125 MHz at Santiago Peak, Corona (Orange) California. WTB Ex. 318 is an SMR repeater license (Call Sign WNPY680), issued May 11, 1993, in the name of Vincent S. Cordaro dba VSC Enterprises, authorizing a facility on 851.4125 MHz at Santiago Peak, Corona (Orange) California, and up to 72 associated mobile units. WTB Ex. 317 was issued when end user licensing was still in effect and thus does not reflect any mobiles; mobiles would be separately licensed to the users on one or more end user licenses. WTB Ex. 318 was issued after October 1992, and therefore reflects authority to operate associated mobiles in addition to the repeater itself. It was not uncommon for SMR licensees to modify their base station licenses to include authority for mobile units after the elimination of end user licensing.

Tr. 1286. The license address on both versions of the Santiago Peak SMR authorization (WTB Exs. 316 and 317) was Cordaro's home address at the time. Tr. 1829. Kay believes that this authorization was later assigned from Cordaro to Marc Sobel sometime after May 1993. Tr. 1286-1287.

117. The "Vince Licenses" Note. WTB Ex. 319 is a handwritten list of information labeled "Vince Licenses". Cordaro requested this list from Kay in late 1992 after Cordaro had received a protest with respect to one of his facilities from Jim Doering, another SMR operator in the Los Angeles area. At Cordaro's request, Kay jotted down a list of pending applications and licenses issued in Cordaro's name. Tr. 1287-1288. The list indicates that Cordaro at the time (1) held an SMRS base station authorization for 852.4875 MHz at Rasnow Peak; (2) had a pending (recently mailed) application for an associated end user license; (3) had a pending application for a new SMRS base station on 851.4125 MHz at Santiago Peak; and (4) had a pending application for an end user license to use Kay's Santiago Peak SMR Station WNXS753 (and indicates that this is on the same frequency as Doering's SMR). WTB Ex. 19. The document also contains the notation: "Attorney - Curt Brown, Brown and Schwaninger, Atty at Law". Id. Kay added this information to the list because Cordaro asked who Kay used as an attorney. Tr. 1287-1288.

118. Cordaro admitted that he had in fact asked for the listing set forth in WTB Ex. 319. He initially insisted that he had done so in late 1994 in connection with entering into the written management agreement with Kay (WTB Exs. 322 & 323), Tr. 1825-1826, 1889-1890, but on cross-examination, when confronted with the dates of various authorizations and applications that are referenced in the handwritten list he equivocated. Tr. 1293-1295. WTB Ex. 319 contains two references to pending SMR end user applications, and such applications were no longer accepted by the FCC after October 1992. It also makes reference to a pending application for a "new" SMR base station at Santiago Peak on 851.4125 MHz, an application which was granted (and hence no longer pending) in 1992, as indicated by the September 30, 1992, license issue date on the authorization for call sign WNPY680 (WTB Ex. 317). Tr. 1293-1295.

119. Cordaro's Independent Business Activities. Cordaro has been an entrepreneur, owning and operating MRSS, long before he came to work for Southland. Tr. 1269. It was fully understood between Cordaro and Kay that Cordaro would be free to pursue outside business interests and activities while he was employed by Southland, "as long as he wasn't banging on competition with [Kay] where he would adversely affect [Kay's] business." Id. Kay knew that Cordaro had a company called VSC Enterprises that was involved in a number of different activities, though he was not aware of all the details; and he also knew that Cordaro together with a friend name Rudy Catania were in some sort of radio communications activities such as installing cable television systems, master antenna systems, etc. Id. Kay also knew that Cordaro had an office in his home. Tr. 1269-1270.

120. Shortly after Cordaro sold MRSS and went to work for Southland, he found himself shifting from being a business proprietor to an employee, and he found that it changed his entire tax structure. In conversations with Kay it was discussed that he could enjoy certain tax

advantages by maintaining a business enterprise in his own name, and one way to do this would be for him to own and operate an SMR station. Tr. 1275-1276. It was as a result of this conversation that Kay assisted Cordaro in obtaining the Rasnow Peak SMR license and entered into a management agreement with Cordaro for the station. Id.

121. VSC Enterprises is a consulting business started by Cordaro before Kay purchased MRSS. It is still in existence today. Tr. 1837. During the hearing Cordaro denied that VSC used radios or ever told Kay that VSC had a need for radios. Tr. 1837-1838. In 1992 Jim Doering, another SMR operator in the Los Angeles area had filed a protest against an SMR end user application filed by Vincent S. Cordaro d/b/a VSC Enterprises, arguing that Kay was the real party in interest behind the application. A responsive letter dated September 4, 1992, was filed jointly on behalf of Cordaro and Kay by Brown and Schwaninger. WTB Ex. 351. The letter response stated:

Separate and apart from his work for Kay ..., Cordaro also operates a radio communications consulting company. ... Prior to undertaking employment from Kay, Cordaro operated an independent business. Part of the understanding under which Cordaro is employed by Kay is that Cordaro is free to engage in any line of business which is not in conflict with his work for Kay. ... If Cordaro is granted the license which he requests, he will operate the units which he requests as an individual and in pursuit of his independent business activities. Accordingly, Cordaro, and not Kay, is the real party in interest in Cordaro's application.

WTB Ex. 351 at p. 2.

122. Attached to the September 4, 1992, letter was an affidavit, executed by Cordaro on September 4, 1992, in which he "declare[d] under penalty of perjury under the laws of the United States that the foregoing document is true and correct." Id. at p. 5. Cordaro admits that it is his signature on the affidavit. Tr. 1841. He says he does not remember whether he saw the September 4 letter before he signed the affidavit, Tr. 1841, but the record indicates that an undated draft of the letter, along with a draft of the affidavit, that had been faxed by Brown and Schwaninger on September 3, 1992, was in Cordaro's possession. WTB Ex. 314; Tr. 1908-1920. It is not Cordaro's practice to sign official documents without reading them. Cordaro acknowledged that the September 4, 1992, affidavit he signed is only one sentence long, that it very clearly made reference to another document, and that he therefore knew when he read and signed it that another accompanying document was involved. Tr. 1920.

(3) Jerry Gales

123. Kay has known Jerry Gales since the 1980's. Tr. 1240. Gales was an SMR operator in the Los Angeles area long before Kay knew him. He operated a trunked system at Oat Mountain and another conventional channel that Kay later purchased from him. Tr. 1243. Gales had health problems which prevented him from doing many of the physical things associated with maintaining an SMR, e.g., going up to the mountain tops, etc., so he made an

arrangement with Kay so that Kay's people could handle those matters. Tr. 1243. WTB Ex. 326 is a written management agreement, dated November 2, 1994, between Gales and Kay, with respect to Station WFFF295. Gales and Kay had an oral arrangement regarding this station prior to November 1994, and it would probably have been entered into about the time Gales first obtained the license for this station. Tr. 1240-1241. Under this arrangement, Kay would provide the equipment, construction, and maintenance of the station, and would market services on the station. Tr. 1245. Gales did not participate in the physical construction and maintenance of the station due to his health condition, but he knew personally the persons who would have done it, i.e., either Kay or Marc Sobel. Tr. 1242, 1245-1246. In partial compensation under this arrangement, Kay provided Gales with free office space at his Van Nuys facility so that Gales could continue to pursue his land mobile sales and marketing activities. Gales operated out of the free office provided to him by Kay from mid-1990 until approximately 1996. Tr. 1244.

124. The station was managed in largely the same manner as the stations Kay managed for Marc Sobel and Vince Cordaro. Tr. 1280. Kay understood that the written agreement was a standard boilerplate agreement used by Brown and Schwaninger. Tr. 1246. It was "[o]ne hundred percent prepared by [Brown and Schwaninger]. They apparently used it for all their clients." Tr. 1247. Kay later learned that after the Commission had designated Marc Sobel for a license revocation hearing based on this agreement, Brown and Schwaninger did "the equivalent of an automotive recall of all these agreements and re-wrote them and even notified all their clients if they had one of these contracts it needed to be rewrote." Tr. 1247.

(5) Carla Marie Pfeifer

125. Kay and Carla Pfeifer first became acquainted in the mid-to-late 1970's. Tr. 1538. At that time Kay operated a shop dealing with citizen's band and side band radios, and Ms. Pfeifer's first husband, who was getting involved in CB, met Kay through a friend. Kay, Pfeifer, and Pfeifer's first husband became social friends. Tr. 1539. Kay and Pfeifer were in the same bowling league, and they gathered together at friends' homes for holiday dinners, birthdays, or just to visit. Tr. 1575. This was a long term relationship. Id. Pfeifer was never employed by Kay, but, on and off during the time from the early 1980's to the early 1990's she did occasionally visit his shop on Saturdays and would pitch in and help with customers if Kay's staff was too busy. Tr. 1539-1540. This was something that happened very sporadically, that she did simply out of friendship with Kay, and for which she did not get paid. Tr. 1574-1575.

126. WTB Ex. 305 is an SMR repeater license (Call Sign WNHD783), issued January 23, 1990, to Carla Pfeifer, authorizing a facilities on 851.3625 and 854.3875 MHz at Castro Peak, Malibu (Los Angeles) California. Kay assisted Pfeifer in obtaining this license pursuant to an arrangement whereby Kay was to construct the station and market service and when it was filled with users Pfeifer would share in the service revenues. Tr. 1541-1542. Pfeifer saw this as a business opportunity for herself as well as for Kay--she viewed it as a venture which, if successful, would make money for her as well as for Kay. Tr. 1575. Pfeifer explained that one of the reasons for this particular arrangement was that Kay was in a better position financially and professionally to finance and implement the station. Tr. 1576.

127. At the time Pfeifer's conventional SMR authorization for Castro Peak (WTB Ex. 305) was issued, Kay would have been eligible to have held an authorization for the same facilities. Without regard to loading on any existing facilities he may have held at the time, he could have nonetheless applied for the same facilities specified in WTB Ex. 305 as a conventional SMR along with a packaged end user application, or he could have applied for the same facilities as a community repeater operator in the business radio service. Tr. 2432-2433. A "package" filing is one in which the SMR base station license application and one or more end users license applications are filed simultaneously, such that the number of end users being authorized is sufficient to fully load the channel. In this situation, any loading or lack thereof on existing facilities held by the base station applicant is irrelevant because the new base station "would be granted into a fully loaded environment." Tr. 2343. This was a method frequently used by Kay, Tr. 976, and the record reflects at least one example of such an application that was in fact granted by the Commission. WTB Ex. 311; Tr. 2437-2439.

128. A number of documents were entered into evidence purporting to bear the signature of Pfeifer, but as to which she questioned whether the signatures were in fact hers. Pfeifer testified: "I have discovered over some time that there have been some papers that have been submitted to FCC that I feel are not my signature." Tr. 1554. She offered no independent basis for this belief, however, other than her subjective determination that some of the signatures do not look to her like her own. Thus, while signature on a letter to the FCC dated August 31, 1987 (WTB Ex. 299), "appears to be my signature...I cannot guarantee it is my signature." Tr. 1554. Similarly, she questions the signature at item 11 of a NABER frequency coordination form (WTB Ex. 303): "It appears to be my signature, but I do not believe it is my signature.... It does not look like my writing." Tr. 1557-1558. When pressed as to what in particular caused her to question the signature, she simply said it was "[t]he whole signature." Tr. 1558. Assuming it is not her signature, she does not know who wrote it. Tr. 1559. Pfeifer further stated that she does not believe it is her signature on a letter to the FCC dated August 4, 1987 (WTB Ex. 304): "The signature on this particular document in no way looks like my signature." Tr. 1559-1560.

129. A number of other documents bear signatures that appear no more or less dissimilar than those discussed above, but which Pfeifer admitted were signed by her. These include: (a) a check dated August 28, 1996 (WTB Ex. 296) Tr. 1546, 1578; (b) a NABER frequency coordination form, at item 11 (WTB Ex. 295) Tr. 1548; (c) a check dated August 28, 1987 (WTB Ex. 302) Tr. 1556; (d) a letter to the FCC dated August 19, 1988 (WTB Ex. 297) Tr. 1557; (e) a letter to the FCC dated August 3, 1987 (WTB Ex. 298) Tr. 1557-1558; and (f) an invoice (WTB Ex. 301) Tr. 1578. The Bureau did not produce the original documents in question, nor did it present any forensic evidence that the signatures were in fact not those of Pfeifer, much less who (if not Pfeifer) wrote the signatures.

130. Kay expressly denied signing Pfeifer's name to virtually any document in the record purporting to bear her signature, Tr. 2342, 2345-2347, including specifically the documents as to which Pfeifer specifically questioned the genuineness of her signature. Tr. 2435 (WTB Ex. 299), Tr. 2436-2437 (WTB Ex. 303), and Tr. 24237 (WTB Ex. 304). When Kay prepared applications or other FCC-related documents on behalf of Pfeifer, he made copies of them and